



Signed: September 26, 2006

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 05-46300 TK
Chapter 7

CAREY SANCHEZ PARA,

Debtor.

DR. DANIEL PARA,

A.P. No. 06-4018 AT

Plaintiff,

vs.

CAREY SANCHEZ PARA,

Defendant.

MEMORANDUM OF DECISION

Prior to the commencement of this bankruptcy case, in connection with the divorce proceeding of the plaintiff (the "Plaintiff") and defendant (the "Debtor") in this adversary proceeding, the Alameda County Superior Court (the "family law court") imposed two obligations on the Debtor: i.e., for \$36,185 and \$31,500, respectively (the "Equalizing Payment Obligations"). These obligations were imposed on the Debtor to compensate for property or

1 debt awards made by the family law court that favored the Debtor. In
2 this adversary proceeding, the Plaintiff seeks a judgment of
3 nondischargeability as to the Equalizing Payment Obligations pursuant
4 to 11 U.S.C. § 523(a)(15). The parties have filed cross-motions for
5 summary judgment with respect to this claim. The motions were heard
6 and taken under submission. Having considered the undisputed facts,
7 based on the admissible evidence presented by the parties, and the
8 applicable law, for the reasons stated below, the Debtor's motion
9 will be granted, and the Plaintiff's motion will be denied.

10 **APPLICABLE LAW**

11 **A. SECTION 523(a)(15)**

12 As applicable here, 11 U.S.C. § 523(a)(15) provides as follows:

13 (a) A discharge under section 727...of this
14 title does not discharge an individual debtor
from any debt-

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16 (15) not of the kind described in paragraph
17 (5) that is incurred by the debtor in the course
of a divorce or separation or in connection with
18 a separation agreement, divorce decree or other
order of a court of record, a determination made
in accordance with State or territorial law by a
governmental unit unless-

19 (A) the debtor does not have the ability to
pay such debt from income or property of the
debtor not reasonably necessary to be expended
20 for the maintenance or support of the debtor or
a dependent of the debtor and, if the debtor is
engaged in a business, for the payment of
21 expenditures necessary for the continuation,
preservation, and operation of such business, or

22 (B) discharging such debt would result in a
benefit to the debtor that outweighs the
23 detrimental consequences to a spouse, former
spouse, or child of the debtor;
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1 11 U.S.C. § 523(a)(15).¹

2 The plaintiff has the burden of proving that the debt is a
3 nonsupport debt incurred by the debtor in the course of a divorce or
4 separation. The burden of proof then shifts to the debtor. To avoid
5 a determination of nondischargeability, the debtor must prove that
6 she is either unable to pay the debt or that requiring her to repay
7 the debt would be more of a hardship than discharging the debt would
8 be to her former spouse. See In re Jodoin, 209 B.R. 132, 138-41
9 (Bankr. 9th Cir. 1997). These "defenses" need not be applied on an
10 all-or-nothing basis. If the evidence presented at trial warrants
11 it, the Court may grant a partial discharge. See In re Myrvang, 232
12 F.3d 1116, 1122-24 (9th Cir. 2000).

13 In determining the debtor's ability to pay, the "disposable
14 income" test set forth in 11 U.S.C. § 1325(b) is the appropriate
15 starting point. However, in the context of 11 U.S.C. § 523(a)(15),
16 given the possibility that a spouse may manipulate his or her budget
17 to gain an advantage in the litigation, the test should utilize
18 prospective income, not just actual current income, as well as
19 reasonable expenses. Jodoin, 207 B.R. at 142. In balancing the
20 hardships, the Court must exercise its discretion, and its decision
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24 ¹Section 523(a)(5) provides that all domestic support
25 obligations are nondischargeable. As applied to all cases filed on
26 or after October 17, 2005, 11 U.S.C. § 523(a)(15) provides that all
domestic nonsupport obligations are also nondischargeable.
However, the Debtor commenced this case prior to October 17, 2005.
Therefore, the form of 11 U.S.C. § 523(a)(15) quoted above governs
the dispute in this adversary proceeding.

1 in this regard is reviewed for abuse of discretion. Myrvang, 232
2 F.3d at 1120.

3 **B. SUMMARY JUDGMENT STANDARDS**

4 Summary judgment motions are governed by Rule 56 of the Federal
5 Rules of Civil Procedure ("FRCP"), made applicable to this adversary
6 proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure
7 (hereinafter "FRBP"). FRCP 56(c) provides that summary judgment
8 should be rendered if the evidence presented shows that "there is no
9 genuine issue as to any material fact" and if the "moving party is
10 entitled to a judgment as a matter of law." The moving party has the
11 initial responsibility to inform the court of the basis for the
12 motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The
13 burden then shifts to the opposing party to establish that a genuine
14 issue exists as to a material fact. Matsushita Elec. Indus. Co.,
15 Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In determining
16 whether summary judgment should be granted, the evidence presented by
17 the opposing party, and all reasonable inferences that may be drawn
18 from that evidence, must be accepted as true. Anderson v. Liberty
19 Lobby, Inc., 477 U.S. 242, 255 (1986); Matsushita, 475 U.S. at 587.

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21 **DISCUSSION**

22 **A. UNDISPUTED FACTS**

23 The Debtor and Plaintiff were married in 1987. They separated
24 in 1997 and subsequently divorced. Plaintiff is a doctor. The
25 Debtor is a graduate of Stanford University. During the marriage,
26 the Debtor worked to assist the Plaintiff in obtaining his medical

1 degree. The couple had a daughter, Maya, in 1997. When the couple
2 divorced, the Debtor was awarded primary custody of Maya. Maya has
3 some health problems that require more than normal parental care.

4 As part of the divorce proceeding, Plaintiff paid to enable the
5 Debtor to obtain an MBA. Since she obtained that degree, for several
6 years, Plaintiff has been under family law court order to search
7 diligently for a job commensurate with her abilities and educational
8 degree. To date, she has failed to find such a position.

9 Instead, the Debtor does work part-time for the City of
10 Pleasanton and does some consulting on her own. She earns only
11 \$1,700 per month and has no benefits through her employment. Her
12 expenses are over \$4,000 per month. Her total income in 2005 was
13 less than \$14,000. She also has student loan debt and pays \$100 per
14 week for child care during the summer. The Debtor lives with her
15 daughter and her disabled parents in a rental house in Castro Valley,
16 California. The Debtor pays half the rent. Other than by sharing
17 expenses, the Debtor's parents do not contribute to the Debtor's
18 support.

19 Plaintiff is a surgeon in Lake Havasu, Arizona. He has
20 remarried and has four children under the age of seven. His income
21 in 2004 was \$225,939 and in 2005 \$147,146. His income has continued
22 to decrease in 2006. He believes that his decreased income is caused
23 by defamatory statements made about him by a colleague whom he is
24 suing as a result. He has substantial secured and unsecured debts
25 and monthly expenses of approximately \$29,000. He has recently been
26 compelled to borrow approximately \$70,000 to pay his malpractice

1 insurance, among other things. He owns a 2001 Ebbtide boat and is
2 making payments on two late model cars.

3 In addition, Plaintiff pays approximately \$1,000 per month for
4 membership in a golf club and approximately \$200 per month for
5 private school tuition. He dines out frequently and spends
6 substantial sums for luxury items, such as \$653 for cigars and \$1,284
7 to mount a game fish.

8 The family law court ordered Plaintiff to pay the Debtor child
9 and spousal support. He is currently in arrears in making these
10 payments in the approximate amount of \$75,000, including accrued
11 interest.

12 **B. EVIDENTIARY OBJECTIONS**

13 With her reply, the Debtor filed evidentiary objections to
14 portions of Plaintiff's opposition and cross-motion.

15 1. She objected to consideration of a three page document which
16 appears to represent a decision by the family law court on or about
17 September 6, 2005 (the "2005 Decision") on the ground that the
18 document has not been properly authenticated. She also objected to
19 consideration of a nine page document which appears to represent a
20 decision by the family law court on or about November 9, 2004 (the
21 "2004 Decision") on the same ground.

22 Authentication as a pre-condition to admissibility is governed
23 by Rules 901 and 902 of the Federal Rules of Evidence. Rule 902(4)
24 provides that a certified copy of a publicly filed document is self-
25 authenticating. The copies of the decisions offered by Plaintiff are
26 not certified. However, Rule 901(7) states that an a public record

1 may be authenticated by providing "evidence that a writing authorized
2 by law to be...filed and in fact...filed in a public office...is from
3 the public office where items of this nature are kept." The Court
4 concludes that the reference to the 2004 Decision in paragraph 4 of
5 Plaintiff's declaration is sufficient to meet this requirement.
6 Thus, with respect to the 2004 Decision, the Debtor's objection is
7 overruled.

8 Plaintiff's declaration neither refers to nor attaches the 2005
9 Decision. A copy of the 2005 Decision is merely attached to
10 Plaintiff's memorandum of points and authorities and subsequently to
11 a notice filed with the Court by Plaintiff. Thus, with respect to
12 the 2005 Decision, the objection is sustained, and the 2005 Decision
13 will not be admitted.

14 2. The Debtor objected to paragraph 4 of Plaintiff's
15 declaration on the ground that it is hearsay.² In this paragraph,
16 Plaintiff purports to quote from a family law decision. The Debtor
17 is correct that the quoted portion of this paragraph constitutes
18 hearsay. Plaintiff has not cited any exception to the hearsay rule
19 that would permit this statement to be considered. Consequently, the
20 quoted portion of this paragraph will be stricken. The reference to
21 the attached 2004 Decision as a copy of Judge Grimmer's decision will
22 not be stricken.

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25 ²Her objection to this paragraph and to a portion of
26 Plaintiff's response on the ground that it is incomplete and/or out
of context is overruled as not constituting a proper evidentiary
objection.

1 3. The Debtor objected to the second sentence of paragraph 8
2 and to paragraph 11 of Plaintiff's declaration on the ground that the
3 statements made therein are conclusory rather than factual.

4 a. In the second sentence of paragraph 8, Plaintiff states that
5 the downward trend in his income reflected by a comparison of his
6 income in 2004 with his income in 2005 has continued during 2006.
7 The Court disagrees that this statement is conclusory rather than
8 factual. The objection is overruled.

9 b. In paragraph 11, Plaintiff states that staffing and billing
10 issues have caused his business income to decline during 2006 to
11 below what it was in 2004 and 2005. Again, the Court disagrees that
12 this statement is conclusory rather than factual. The objection is
13 overruled.

14 4. The Debtor objected to page 7, lines 6 through 10 of
15 Plaintiff's response and cross-motion filed on August 3, 2006 on the
16 basis that it is unsupported by any evidence and constitutes hearsay.
17 This objection is again directed to the same quotation from a family
18 law decision contained in Plaintiff's declaration. For the same
19 reason, the Court will sustain the objection and strike the language
20 in question.

21 **C. LEGAL ARGUMENT**

22 **1. Ability to Pay**

23 It is undisputed that the Debtor's current monthly income is
24 approximately \$1,400 and her monthly expenses exceed \$4,000. Even if
25 some of her expenses are nonessential, clearly, she has no disposable
26 income at present. However, as noted in Jodoin, in the context of 11

1 U.S.C. § 523(a)(15), the debtor's current disposable income is merely
2 the starting point in determining her ability to pay a nonsupport
3 divorce related obligation. Jodoin, 209 B.R. at 49. Because a
4 bankruptcy discharge is forever, one must also consider the debtor's
5 prospective disposable income.

6 As a graduate of Stanford University, and the recent recipient
7 of an MBA, the Debtor presumably has the ability to earn a greater
8 income than she does at present. Plaintiff contends that the Debtor
9 has intentionally kept her income low to gain a litigation advantage
10 in connection with her divorce proceeding and her bankruptcy case.
11 In support of this contention, he cited In re Florio, 187 B.R. 654,
12 657-58 (Bankr. W.D. Mo. 1995) in which income was imputed to a debtor
13 for purposes of 11 U.S.C. § 523(a)(15)(A) who voluntarily left her
14 job as a surgical technician to work at a dog grooming business that
15 paid her no income.³

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18 ³Not suprisingly, Plaintiff failed to cite In re Lonian, 226
19 B.R. 248, 253-57 (Bankr. W.D. Okla. 1998). In Lonian, the debtor
20 was a physician who had voluntarily closed his practice shortly
21 before the dischargeability trial. During the three years prior to
22 his bankruptcy filing, he had earned \$330,000, \$360,000, and
23 \$181,000, respectively. Nevertheless, he had failed to pay his
24 income taxes and thus had substantial nondischargeable tax debt.
25 After closing his practice and seeking employment, he claimed that
26 the best job offer he had received was for \$120,000. The Court
concluded that the debtor was capable of earning more than he
claimed and thus had the ability to pay his nonsupport debt to his
former spouse. It refused to reward him by discharging the debt to
his former spouse because he had failed to pay his tax debt at a
time when he was clearly able to do so. Given the reversal of
roles in the instant case, this case is not applicable to a
determination of the 11 U.S.C. § 523(a)(15)(A) prong. However, it
does inform the Court's decision on the 11 U.S.C. § 523(a)(15)(B)
prong.

1 The Debtor has presented no evidence explaining her failure to
2 obtain more remunerative employment to date as a result of her job
3 search. Her statements concerning Maya's health problems and her
4 need for her mother's attention are too vague to excuse the Debtor
5 from obtaining more remunerative employment as a matter of law.
6 However, it is not insufficient to create a genuine issue of fact in
7 that regard. Thus, both the motion and cross-motion, to the extent
8 that they are based on the 11 U.S.C. § 523(a)(15)(A), are denied.

9 **2. Balance of Hardships**

10 Balancing the hardships under 11 U.S.C. § 523(a)(16) to some
11 extent requires a crystal ball. At present, the Debtor is clearly in
12 more straightened financial circumstances than Plaintiff. Plaintiff
13 may be subject to substantial debt and required to borrow to meet
14 certain critical current obligations. However, he lives the
15 lifestyle of an affluent person while the Debtor lives frugally.

16 However, it is possible, perhaps even likely, that, in the
17 future, the Debtor's economic circumstances will improve. It is also
18 possible that Plaintiff's economic circumstances will become worse.
19 The Court cannot determine the future with any certainty. It is
20 possible that additional evidence presented at trial could help the
21 Court in formulating a reasonable prediction. Thus, but for one
22 additional undisputed fact, the Court would also deny summary
23 judgment on both motions on this prong.

24 The additional fact is Plaintiff's failure to pay court ordered
25 spousal and child support in an amount totaling at present, with
26 accrued interest, \$75,000. Balancing hardships is an equitable

1 endeavor. Parties who seek an equitable determination must behave
2 equitably. Failing to pay court ordered support to a former spouse
3 and one's child in favor of paying dues to a country club, among
4 other things, does not satisfy generally accepted equitable
5 standards. Thus, the Court will grant the Debtor's motion for
6 summary judgment under 11 U.S.C. § 523(a)(15)(B) and will discharge
7 the Equalizing Payment Obligations. The Court will deny Plaintiff's
8 cross-motion for summary judgment.

9 **CONCLUSION**

10 The Equalizing Payment Obligations are nonsupport obligations
11 incurred in connection with a divorce and thus are nondischargeable
12 unless the Debtor meets her burden of proving a defense under either
13 11 U.S.C. § 523(a)(15)(A) or (B). The Court concludes that the
14 neither the Debtor nor Plaintiff have established a right to summary
15 judgment with respect to the Debtor's ability to pay under 11 U.S.C.
16 § 523(a)(15)(A). However, the Court concludes that, based on the
17 undisputed evidence, pursuant to 11 U.S.C. § 523(a)(15)(B), it would
18 be a greater hardship on the Debtor to fail to discharge the
19 Equalizing Payment Obligations than it would be a hardship on
20 Plaintiff to discharge them. Counsel for the Debtor is directed to
21 submit a proposed form of order and judgment in accordance with this
22 decision.

23 **END OF DOCUMENT**
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